Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

CITY OF OPA LOCKA,

Petitioner,

vs.

A. GRIFFIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals issued an opinion in conflict with other decisions of the Supreme Court and Courts of Appeals, when it ruled that City Manager Neal acted under "color of law" when he raped Respondent, Griffin, on the evening of November 1, 1995 in her North Miami apartment.

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Pursuant to Rule 12.5, the materials included in the Appendix to the opening Petition for Writ of Certiorari have not been reproduced again. No additional materials are deemed necessary.

OPINION BELOW

The decision of the Eleventh Circuit Court of Appeals is reported at 261 F.3d 1295 (11th Cir. 2001) and is attached to the opening Petition at App. 1a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on August 17, 2001. Respondent, Griffin's, request for panel rehearing was denied on October 15, 2001. Pet. App. 45a. The Petitioner, City of Opa Locka, expressly relies on Rule 12.5 in connection with the filing of this Conditional Cross Petition for Writ of Certiorari. The opening Petition for Writ of Certiorari was docketed on January 23, 2002, Case Number 01-1069. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 United States Code, Section 1983, states in pertinent part:

> Every person who, **under color of any statute, ordinance, regulation, custom or usage, of any state** . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and

equity, or other proper proceeding for redress. (Emphasis added).

STATEMENT OF THE CASE

This is an employment related lawsuit. Respondent, Angelita Griffin (hereinafter "Griffin"), sued her former employer, Petitioner, City of Opa Locka (hereinafter "City"), and its former City Manager, Earnie Neal, seeking damages based on workplace sexual harassment and the sexual assault of Griffin by Neal on November 1, 1995, at Griffin's North Miami apartment. Relief was sought against the City for claimed violations of 42 U.S.C. §§ 1983 and 2000e. Pet. App. 7a.

The City of Opa Locka is located in northwest Miami-Dade County and is a relatively small municipality which employs fewer than 200 persons. Pet. App. 3a. Griffin began her employment with the City in 1992 as a temporary worker and eventually became a permanent clerical employee at the City. In June of 1995, the City Commission hired Neal as City Manager. Pet. App. 3a. The City has a manager/commission form of government in which an appointed manager serves as the chief executive officer and an elected mayor and four commissioners serve as the board of directors responsible for establishing policy for the municipality. Pet. App. 3a.

From June 13, 1995 until her departure from the City in early November 1995, Griffin perceived that she was sexually harassed by Neal. On October 26, 1995, Griffin tendered her resignation to the City. Pet. App. 6a.

On the afternoon of November 1, 1995, Griffin left work at the City and went home to her apartment to get

ready to perform as a singer at a Rotary Club function later that evening. Griffin had previously entered into an agreement with the Rotary Club director to sing at an installation dinner and to be paid for her performance. On the way to the Rotary Club function, Griffin damaged her car and following dinner, agreed to accept a ride home from Neal. Pet. App. 14a-15a.

At approximately 11:00 p.m., Neal drove Griffin to her gated and security patrolled apartment complex located in the City of North Miami. Pet. App. 6a. Neal helped Griffin carry her karaoke machine up to the apartment and Neal entered the apartment without an invitation. While Griffin was in the kitchen to get Neal a beverage, Neal sexually assaulted Griffin. Pet. App. 6a. No evidence was presented that Neal threatened Griffin's job or threatened to take any action with regard to her job if she did not engage in sexual relations with him. Indeed, no evidence was presented that Neal referred in any manner to his position at the City while at Griffin's apartment.

A jury trial commenced on March 20, 2000 in the Southern District of Florida. On March 31, 2000, the jury returned a verdict which found that Neal sexually harassed Griffin in the workplace; that Neal sexually assaulted Griffin in her apartment on November 1, 1995; that Neal acted under color of state law at the time of the sexual assault; and that the City had a policy or custom of condoning sexual harassment. Pet. App. 2a. The jury awarded Griffin $1,500,000.00 for the November 1, 1995 sexual assault and $500,000.00 for the workplace sexual

harassment. On April 5, 2000 the Court entered a judgment against the City and Neal in the total amount of $2,000,000.00. Pet. App. 2a.

Both the City and Neal appealed the District Court's Judgment. The United States Court of Appeals for the Eleventh Circuit affirmed the Judgment against Neal in its entirety. Pet. App. 41a. The Court of Appeals also affirmed that portion of the Judgment which awarded $500,000.00 in damages against the City for workplace sexual harassment under both 42 U.S.C. § 1983 and Title VII. Pet. App. 41a. Finally, the Court of Appeals held that Neal acted under color of state law at the time of the sexual assault (Pet. App. 14a), but reversed the $1,500,000.00 damage award against the City based on the fact that the jury had not found that the City had a policy or custom of allowing or condoning sexual assault. Pet. App. 32a. The Court of Appeals expressly declined to address the issue of whether the evidence was sufficient to establish such a policy or custom. Pet. App. 32a.

REASONS FOR GRANTING THE WRIT

In holding that Neal acted under color of law at the time of the sexual assault, the Court of Appeals expanded the scope of federal jurisdiction over torts and crimes committed by government officials in their private lives. The Court of Appeals decision conflicts with *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed. 2d 509 (1981) (function, not employment relationship, determines whether actions are under color of state law) and *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941) (color of state law involves

actions made possible only because the wrongdoer is clothed with the authority of state law). The Eleventh Circuit's decision also conflicts with the decisions of other Courts of Appeals and the Eleventh Circuit itself. *Becerra v. Asher*, 105 F.3d 1042 (5th Cir. 1997); *Waters v. City of Morristown*, 242 F.3d 353 (6th Cir. 2001); *Roe v. Humke*, 128 F.3d 1213 (8th Cir. 1997); *Jojola v. Chavez*, 55 F.3d 488 (10th Cir. 1995); *D.T. v. Independent School District No. 16 of Pawnee County, Oklahoma*, 894 F.2d 1176 (10th Cir. 1990); and *Almand v. DeKalb County, Georgia*, 103 F.3d 1510 (11th Cir. 1997).

In addition, the Court of Appeals announced a new standard for determining when a government official's actions should be regarded as conduct under color of state law and fairly attributable to the state and held as follows:

> [N]eal's official duties did not simply provide him the opportunity to become acquainted with Griffin or to develop a relationship of trust with her that he later used to facilitate assault outside the workplace. Rather, he used his authority as Griffin's boss on a daily basis to harass and humiliate her during and after work hours both at the workplace and City related functions. This pattern of harassment and the assertion of control over Griffin both at the workplace and beyond is what differentiates this case from those where a police officer or teacher befriends or meets a victim while acting in the course of his official duties, but then later assaults them off duty, off premises, while acting in a private or personal capacity.

Pet. App. 21a-22a. (footnotes omitted)

In connection with this holding, the Eleventh Circuit also stated the following:

> It is the egregious and escalating nature of the abuse of Neal's official authority in this case to perpetrate both harassment and ultimately rape against Griffin that tips the color of law analysis in favor of concluding he was acting under color of law. Although subtle, we again reiterate the critical distinction in the color of law analysis between those cases where a state actor directly uses his official authority to create the opportunity to sexually assault a victim and those cases where a state actor merely uses his authority to develop or facilitate a relationship of trust with a victim. . . .

Pet. App. 22a. The Eleventh Circuit also stated:

> We do not believe that under the facts of this case we are required to view the sexual assault in isolation or ignore Neal's persistent abuse of authority leading up to the assault in making our color of law determination. Rather, we believe that the entire pattern of abuse and harassment against Griffin that eventually culminated in her rape is relevant to our color of law analysis.

Pet. App. 17a.

In so holding, the Court of Appeals extends federal jurisdiction to the torts committed by public officials in their private lives, even where the tortuous action is not connected with the official's function, not made possible by the official's authority and is not fairly attributable to the state.

Finally, it has been many years since the Supreme Court has addressed the color of state law requirement in the context of a wrong committed by a person employed by a governmental entity outside of the course and scope of their employment or function. During these many years, the scope of litigation under 42 U.S.C. § 1983 has dramatically expanded and it is respectfully submitted that now is an appropriate time to again address the color of state law issues raised by this case.

CONCLUSION

In the event the Court grants the original Petition for Writ of Certiorari, it is respectfully submitted that this Conditional Cross Petition for Writ of Certiorari should also be granted.

Respectfully submitted,

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Cross-Petitioner,

v.

A. GRIFFIN,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals followed the decisions of this Court and other Courts of Appeals when it ruled that the record evidence supported the jury's conclusion that Earnie Neal acted pursuant to his power as City Manager, abused that power to facilitate the rape, and therefore acted under color of law when he assaulted Ms. Griffin.

STATEMENT OF THE CASE

The Statement of the Case of Conditional Cross-Petitioner City of Opa Locka ("the City") is grossly incomplete. It omits to tell the whole story of what the City and Earnie Neal did to Ms. Griffin and the way Neal abused his power as City Manager to facilitate the rape. Specifically it fails to detail the predatory workplace harassment of Ms. Griffin by Neal and the events of the night of the rape which establish that Neal was acting under color of law. Rather than burdening this Court with a lengthy repetition of the facts here, Ms. Griffin refers the Court to the comprehensive summary of the facts contained in the opinion of the Eleventh Circuit. App. 3a-7a; 14a-18a; 19a n.9; 21a n.11; 23a-30a. Upon reading these facts, it should be clear to this court — as it was to the jury and to the Eleventh Circuit — "that Neal used his authority as City Manager to facilitate the assault on Griffin and that he was therefore acting under color of law at the time of the assault." App. 17a.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

It is not surprising that the City has omitted to present a statement of the facts which includes the record evidence that the jury and the Eleventh Circuit relied on in finding that Neal acted under color of law when he raped Ms. Griffin. From the outset the City has maintained that Neal's acts that night were of a private or personal nature. Even in the face of this evidence, the jury's finding that the assault was under color of law, and the Eleventh Circuit's affirmance on that point, the City acts like an ostrich with its head in the sand, as if the facts do not exist. It continues to maintain that the events of November 1, 1995, had nothing to do with Neal's position as City Manager and the authority and power he derived therefrom.

To avoid the color of law finding, the City asserts that *Griffin v. Opa Locka*, conflicts with a number of other decisions and also that the Eleventh Circuit "expanded the scope" and announced a new standard for what actions will be considered to be under color of law. Essentially, the City continues to ignore the evidence and asserts that in raping Ms. Griffin, Neal was on a frolic of his own — not acting under color of law. It is clear, however, from a reading of the pertinent parts of the opinion, that there is no conflict and no extension of the law.

As to the City's claims of conflict, not a single one of the cited cases is factually analogous to the case at bar. Each of them relies on and applies the same well settled color of law analysis that was applied by the Eleventh Circuit in this case. None of them state a rule of law that differs in any way from that applied in *Griffin*. The Court of Appeals addressed and distinguished most of the cases that the City alleges to be in conflict. *See* App. 20a-22a for discussion of inapplicability of *Becerra v. Asher*, 105 F.3d 1042 (5th Cir. 1997); *Roe v. Humke*, 128 F.3d 353 (6th Cir. 2001); *D.T. v. Independent School Dist No. 16*, 894 F.2d 1176 (10th Cir. 1990); and *Almand v. DeKalb County*, 103 F.3d 1510 (11th Cir. 1997). Ms. Griffin relies on the Eleventh Circuit's analysis of these cases and incorporates it herein to show that the decisions have no application to the instant facts and therefore cannot form the basis for conflict jurisdiction. The other cases cited by the City will be discussed below.

Polk County v. Dodson, 454 U.S. 312 (1981) addressed the question of "whether a public defender acts 'under color of state law' when representing an indigent defendant in a state criminal proceeding." *Id.* 315. This Court held in the negative because of the independent nature of the attorney's

relationship and obligations to the client notwithstanding that the attorney was employed by the state. There was no attorney-client or other relationship of independent loyalty in *Griffin*. *Polk County v. Dodson* is not analogous and does not conflict with the decision in this case.

United States v. Classic, 313 U.S. 299, 326 (1941) simply held that a person acts under color of law when exercising power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." The detailed recitation of the facts in the Eleventh Circuit's decision establishes that Neal used his authority as City Manager to: (1) dismiss others that offered to take Ms. Griffin home; (2) have her park her car at the City police station; (3) talk to her about work while he drove her home; and (4) enter her apartment. When Ms. Griffin resisted his sexual advances, Neal reminded her of his power as City Manager. App. 14a-17a. The Eleventh Circuit actually relied on *United States v. Classic* in reaching its decision. App. 13a. The decision does not conflict with this case.

Neither is there conflict with *Waters v. City of Morristown*, 242 F.3d 353 (6th Cir. 2001). Waters sued her veterinarian employer under 42 U.S.C. § 1983 for various harassing conduct. She claimed that his actions were under color of law because he was also a city alderman. The court applied the very same analysis applied by the *Griffin* court and concluded that the harassment occurred as a result of the "close personal relationship" and the employer/employee status between Waters and the veterinarian. The court noted that the veterinarian "would have been in the same position to harass and abuse Waters even if he had not been a city alderman." 242 F.3d 359. The instant facts are quite different. As fully explained by the Eleventh Circuit, Neal and

Ms. Griffin had no relationship at all outside of her role as city employee and his role as City Manager. App. 21a n.11. Neal unquestionably used his power as City Manager to facilitate the rape and, but for that power, Ms. Griffin would have had another ride home and the rape would have not occurred.

Similarly, *Jojola v. Chavez*, 55 F.3d 488 (10th Cir. 1995) presents no conflict. There a school janitor molested a student. The court simply ruled that the janitor could not have been acting under color of law because — unlike Neal — he neither had any state authority over the student nor used such power to facilitate his acts. *Jojola* presents no conflict.

Next the City asserts that the Eleventh Circuit has extended the color of law analysis to include acts "committed by government officials in their private lives." Conditional Cross-Petition at p. 4. Specifically, the City complains that by its decision, the Court of Appeals has extended "federal jurisdiction to the torts committed by public officials *in their private lives*, even where the tortuous (*sic*) action is not connected with the official's function, not made possible by the official's authority and is not fairly attributable to the state." Conditional Cross-Petition, p. 6 (emphasis added).

The Court of Appeals held that on the night of the rape, "Neal utilized his authority as City Manager to facilitate the assault on Griffin and that he was therefore acting under color of law at the time of the assault. . . ." App. 17a. This is not an extension of the color of law analysis to acts of Neal in his private life. The court's analysis correctly focused on the rape as it related to Neal's function as City Manager, his misuse of authority and the consequences thereof. App. 14a, 17a.

The City quotes three passages from the appellate decision that discuss the relevance of Neal's conduct with Ms. Griffin prior to the night of the rape. It contends that these references to the workplace harassment somehow establish a new standard for determining whether a city official acted under color of law. If there were no facts to support an independent conclusion that Neal was acting under color of law at the time he raped Ms. Griffin, perhaps the events that preceded the night of the incident would not be relevant. But such is not the case here where, on the night in question, Neal used his municipal authority to facilitate the assault and even reminded his victim of this power as he raped her. This is not an extension of the law and certainly not a basis for this Court to exercise its certiorari jurisdiction.

Finally the City argues that this court should grant certiorari because it has not opined lately on the color of law issue "in the context of a wrong committed by a person employed by a governmental entity outside the course and scope of their employment function." Conditional Cross-Petition at p. 7. This opinion does not present conflict with any decision of any other court and does not state a new rule of law or change an existing one. The well established color of law analysis was applied. Accordingly, the lack of a recent opinion is hardly a ground for jurisdiction. Especially where, as here, there was ample evidence to support the jury's finding and the Eleventh Circuit's affirmance that Neal acted under color of law when he raped Ms. Griffin.

CONCLUSION

The Petition for a Writ of Certiorari should be granted and the Conditional Cross-Petition should be denied.

Respectfully submitted,

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